

## IN THE UNITED STATES DISTRICT COURT

## FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 FELICE PACE, WILDERNESS WATCH,

No. C 12-05610 SI

12 Plaintiffs,

**ORDER GRANTING MOTION TO FILE  
AMENDED COMPLAINT AND  
DISMISSING AS MOOT MOTION TO  
DISMISS ORIGINAL COMPLAINT**13 v.  
14 CHARLTON H. BONHAM, STAFFORD  
15 LEHR, CALIFORNIA DEPARTMENT OF  
FISH AND GAME,

16 Defendants.

17

---

  
18 On March 15, 2013 the Court heard oral argument on defendants' motion to dismiss. Docket  
19 No. 20. After the argument, and while that motion was under consideration, plaintiffs filed a motion  
20 to amend. Docket No. 37.<sup>1</sup> Plaintiffs seek to add additional factual allegations, including the allegation  
21 that “[m]ortality rates from the aerial stocking of fish often approach 50%, as a result of transport, the  
22 drop, or because these stocked fish do not feed or survive well after stocking.” Proposed Second  
23 Amended Complaint, Docket No. 37-1, ¶ 10.<sup>2</sup>24

---

  
25<sup>1</sup> The motion to amend is set for hearing on Thursday May 2, 2013. Pursuant to Civil Local  
26 Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and hereby  
VACATES the hearing.27<sup>2</sup> Defendants argue that plaintiffs' motion is procedurally improper and should have been styled  
28 as a motion for reconsideration or request to submit a supplemental brief. See Opposition to Motion to  
Amend at 1-3. However, while at oral argument on defendants' motion to dismiss the Court's tentative  
view was the motion to dismiss should be granted and the minute order following the argument noted  
that the “[M]otion to dismiss is tentatively granted,” the Court had not yet issued its final ruling. The  
Court, therefore, will consider the motion to amend on its merits.

1       The Court finds that the motion to amend should be GRANTED and plaintiffs' Second Amended  
2 Complaint can be filed. The Court cannot, at this early stage, determine that leave to amend would be  
3 futile, since "a proposed amendment is futile only if no set of facts can be proved under the amendment  
4 to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton,*  
5 *Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citing *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 89  
6 (N.D. Cal. 1978)). Given the new allegation regarding the mortality of the stocked fish, the Court finds  
7 that further proceedings and factual development will be required to determine whether at least some  
8 of the fish being stocked would fall within the definition of "biological materials" that are pollutants  
9 under *Association to Protect Hammersley v. Taylor Resources (Hammersley)*, 299 F.3d 1007 (9th Cir.  
10 2002).

11       Accordingly, the motion to file the Second Amended Complaint is GRANTED; accordingly, the  
12 motion to dismiss the original complaint is MOOT.

13  
14       **IT IS SO ORDERED.**

15  
16 Dated: April 30, 2013

  
\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28